No. 15,940

United States Court of Appeals

For the Ninth Circuit

Otis, McAllister & Co., a corporation,
Appellant,

vs.

Skibs, A/S Marie Bakke,
Appellee.

APPELLANT'S OPENING BRIEF.

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FILED
MAY 23 1958
PAUL P. O'BRIEN, CLERK

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APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final admiralty decree of the United States District Court for the Northern District of California, Southern Division, made and entered on December 4, 1957 (Tr. 46). Notice of appeal was filed February 27, 1958 (Tr. 47), within the ninety day period fixed by section 2107 of Title 28, U.S. Code.

The action was commenced on the admiralty side of the District Court by a libel *in rem* and *in personam,* (Tr. 3) filed by appellant, to recover for damage suffered during transit by a shipment of coffee which appellee had agreed to carry on board its vessel from Peru to San Francisco. The admiralty jurisdiction of the District Court is founded on Art. III, sec. 2, of the United States Constitution and sec. 1333 (1) of Title 28, U. S. Code.

The appellate jurisdiction of the Court of Appeals for the Ninth Circuit is granted by the same section of the Constitution and by sections 41, 1291 and 1294 of Title 28, U. S. Code.

STATEMENT OF THE CASE.

This case involves the sole issue of the proper measure of damages for loss and/or damage to cargo shipped under an ocean bill of lading subject to the Carriage of Goods by Sea Act, sections 1300-1315 of Title 46, U. S. Code. The case was tried on an agreed statement of facts, and there are no factual issues or conflicts of testimony to be resolved.

Appellee, as a common carrier of goods for hire, received a shipment of coffee in good order and condition at Callao, Peru, issued its bill of lading therefor, and agreed to carry the coffee on its vessel MARIE BAKKE to San Francisco and to deliver it there in the same good order and condition as when received. Upon the arrival of the vessel at San Francisco appellee failed to deliver 162 pounds of the shipment and delivered 71,097 pounds thereof in a damaged condition due to contamination by a foreign substance during transit. Appellant was the owner of the coffee during the voyage and was entitled to bring an action for the damage and loss which resulted.

The damaged coffee was reconditioned at a cost of $1,117.80 and was thereafter sold for $31,468.62, both amounts being reasonable. The F.O.B. invoice value of the coffee in question, plus freight and insurance, was $00.4976 per pound, while the sound market value of

similar coffee, at the time and place of delivery, was $00.5475 per pound. Appellee admitted liability but reserved the right to try the issue of whether appellant's damages should be computed with reference to invoice value or market value.

All of the foregoing facts appear in the agreed statement (Tr. 31) and were so found by the District Court (Tr. 40).

In the Court below appellee claimed that its liability should be limited to invoice value by virtue of clause 18 in its bill of lading, and also by reason of an alleged custom in the trade. The bill of lading is reproduced in full as an exhibit to the agreed statement (Tr. 36), and clause 18, the so-called "invoice value clause", is set forth in the answer (Tr. 9), the agreed statement (Tr. 33), and in Finding VII (Tr. 43). The alleged custom is set forth in the amendment to answer (Tr. 11).

Appellant took the position that the Carriage of Goods by Sea Act prohibited any clause, "agreement", or other device seeking to limit or restrict recovery for cargo damage other than as expressly sanctioned by the Act. It filed exceptions to the answer and amendment to answer (Tr. 28) seeking to have both the bill of lading defense and the custom defense stricken. The District Court overruled the exceptions (Tr. 30) and the case proceeded to trial on the agreed statement. The trial Court followed the prior ruling on exceptions, held the invoice value clause valid, and ordered a decree based upon invoice value (Tr. 39). Conclusion V expressly stated that no determination was made on either the existence or validity of the alleged custom (Tr. 45).

The issue on this appeal is whether a common carrier subject to the Carriage of Goods by Sea Act may utilize an invoice value clause to reduce its liability to an amount less than the actual damages suffered, as measured by the traditional rule of market value. Appellee maintains that any such clause is valid so long as it is a "true valuation clause." Appellant contends that no such clause is valid, regardless of how it is phrased or what it is called, since it is not expressly sanctioned by the Act. Recent trial court decisions by the District Court in New York and the Exchequer Court of Canada have held invoice value clauses invalid on the grounds advanced by appellant. No reported decision of any court (except that of the District Court herein) has upheld the validity of such a clause under the Carriage of Goods by Sea Act. There being no prior appellate decision on the precise point involved, the decision of this Honorable Court will be of great importance to everyone connected with the shipment and carriage of merchandise to and from United States ports in foreign commerce.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In holding that clause 18 of the bill of lading does not contravene Section 3(8) or any other provision of the United States Carriage of Goods by Sea Act, 1936;

2. In holding that appellant's damages are to be measured in accordance with clause 18 of appellee's bill of lading;

3. In failing to hold that the invoice value clause in appellee's bill of lading (clause 18) is invalid under the provisions of the United States Carriage of Goods by Sea Act, 1936;

4. In failing to measure and determine appellant's damages on the basis of the sound market value of the shipment at destination.

ARGUMENT.

Appellee delivered contaminated coffee to appellant in San Francisco, thereby breaching its duty to carry the shipment safely, and becoming liable in damages for appellant's loss. In the absence of any valid contractual stipulation to the contrary, those damages are to be computed by comparing the damaged value with the value which the goods would have had on the market at destination had they arrived in sound condition.

> *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral,* 263 U.S. 119, 44 S. Ct. 30, 68 L. ed. 201;
> *H. Liebes & Co. v. Klengenberg,* 23 F. 2d 611 (9th Cir.);
> *United S.S. Co. v. Haskins,* 181 Fed. 962 (9th Cir.);
> *Northern Commercial Co. v. Lindblom,* 162 Fed. 250 (9th Cir.).

Under the foregoing rule appellant's damages are $8,663.49, computed as follows:

Sound market value of 71,097 lbs. @ .5475	$38,925.61
Less gross salvage return	31,468.62
	$ 7,456.99
Plus reconditioning expense	1,117.80
Plus 162 lbs. non delivered @ .5475	88.70
Total	$ 8,663.49

The District Court, however, ruled that Clause 18 of appellee's bill of lading, providing for an "agreed value" equal to shipper's invoice plus freight, insurance and duties, was a valid stipulation for a substitute measure. Damages of only $5,107.66 were awarded, computed in accordance with the clause:

71,097 lbs. @ .4976	$35,377.87
Less gross salvage return	31,468.62
	$ 3,909.25
Plus reconditioning expense	1,117.80
Plus 162 lbs. non-delivered @ .4976	80.61
Total	$ 5,107.66

(The factors used in the above computations are taken from Findings IV, V, VIII and IX.)

Appellant will demonstrate that it was clear error on the part of the District Court to give any effect to the invoice value clause. The Carriage of Goods by Sea Act expressly prohibits any clause lessening the carrier's liability for loss or damage otherwise than as provided therein. Since invoice value clauses are not provided for

in the Act, they cannot be given effect, when to do so would be to lessen the carrier's liability.

I.

THE STATUTORY REGULATION OF BILLS OF LADING IN FOREIGN COMMERCE.

From 1893 until 1936 the liability of common carriers by water was regulated by the Harter Act, 46 U. S. Code secs. 190 et seq. In 1936 the Harter Act was superseded in foreign trade by the Carriage of Goods by Sea Act, 46 U. S. Code, secs. 1300 et seq. In general, "true valuation clauses" were valid under the Harter Act. Their validity under the Carriage of Goods by Sea Act is the issue on this appeal.

The District Court ruled, in effect, that the 1936 Act had made no change in this area of bill of lading law, and that a valuation clause valid prior to 1936 continues to be good today. In order to understand the error in that ruling it is necessary to compare the relevant portions of the two statutes.

A. The Carriage of Goods by Sea Act expressly prohibits clauses which "lessen" carrier's liability to cargo.

The 1936 Act, hereinafter termed "Cogsa" for convenience, applies to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade (46 U.S.C.A. Sec. 1312). It defines not only the substantive rights and obligations of the parties to such contracts, but also the extent to which the contract itself

can prescribe the measure of damages for breach of those rights and obligations. The following sections, which allow certain limitations but forbid all others, condemn the clause upheld by the District Court:

> Section 4(5): "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.
>
> "By agreement between the carrier, master, or agent of the carrier, and the shipper, another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained." (46 U.S.C.A. Sec. 1304(5).)
>
> * * * * * * *
>
> Section 3(8): "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect." (46 U.S.C.A. Sec. 1303(8).)

The commands of the statute are plain. "The amount of damage actually sustained," determined by traditional rules of damages in carrier cases, is to be the basic measure, subject to a limit of $500 per package on high value shipments. By agreement, the parties may fix a higher limit per package than $500, but not a lower one. Any clause otherwise lessening carrier's liability, such as appellee's "invoice value" clause, is null and void.

Section 3(8) is the key to the true meaning of Cogsa. Its effect is twofold. On the one hand it prohibits clauses "*relieving*" the carrier from liability. Such a clause might read: "not responsible for damage to goods caused by contact with other cargo." In addition, it prohibits clauses "*lessening* such liability otherwise than as provided in this chapter." The invoice value clause is an example of such a clause, since it lessens appellee's liability below what it would otherwise be. It is this double-barreled effect of 3(8) which distinguishes it from parallel sections of the Harter Act, and which renders cases decided under the Harter Act meaningless as authority on valuation clauses in bills of lading governed by Cogsa.

B. The Harter Act contains no reference to clauses lessening the carrier's liability.

Section 1 of the Harter Act (46 U.S. Code sec. 190) provides as follows:

> "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause,

> covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect."

The foregoing section applies only to clauses whereby the carrier "shall be *relieved* from liability." It says nothing about clauses *lessening* such liability. The only use of the verb "lessen" in the Harter Act appears in Section 2 (46 U.S. Code sec. 191), which invalidates any covenant or agreement whereby the "obligations" of the carrier to furnish a seaworthy vessel or to care for her cargo "shall in any wise be lessened, weakened, or avoided."

There is a clear difference between lessening an *obligation* and lessening a *liability*. An obligation is a duty; a liability is the result of a breach of that duty. Until a duty is breached no liability can exist. To lessen an obligation, therefore, is to "relieve from liability", for it prevents certain liabilities from ever arising. Sections 1 and 2 of the Harter Act, like the first part of Cogsa 3(8), preserve the underlying obligations of the carrier and prohibit clauses which lessen those obligations or (which is the same thing) which relieve the carrier from liability for a breach thereof. Unlike section 3(8) of Cogsa, however, there is nothing in the Harter Act prohibiting clauses which *lessen* the carrier's *liability,* and for that reason certain valuation clauses were upheld in Harter Act litigation.

II.

THE PHRASE "LESSENING SUCH LIABILITY" MEANS LESSENING THE DOLLAR AMOUNT THEREOF.

There is only one way to measure a carrier's liability, and that is by the amount of money (or other recompense) which must be paid to the damaged cargo claimant. It follows that a lessening of that liability must refer to a reduction in the amount of money the carrier has to pay, a proposition which is confirmed by cases arising under both the Harter Act and Cogsa.

In *Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494, 55 S. Ct. 483, 79 L. ed. 1016 (1935), the Supreme Court had occasion to distinguish between "limitation" clauses, which were valid under the Harter Act only if a choice of rates were offered to the shipper, and "valuation" clauses, which were upheld under the Harter Act regardless of rates.

In essence, the Court defined a limitation clause as one which placed a ceiling on the carrier's liability, so that it could operate only to the carrier's advantage, and a "valuation" clause as one which stated an agreed value and could therefore benefit either party to the contract, depending upon whether the actual value was greater or less. The refinements of the distinction are of only historical interest, since neither type of clause is valid today unless expressly sanctioned by Cogsa. The important thing about the *Ansaldo San Giorgio* decision is that, in defining a "true valuation clause," the Court used language almost identical with that which Congress later used in describing the type of clause prohibited by Cogsa:

"The other is a true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment. Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, *and may lessen the carrier's normal liability* if they should appreciate prior to that time." (294 U.S. at 497, 55 S. Ct. at 485, 79 L. ed. at 1020) (Emphasis added).

In describing a true valuation clause as one which might "lessen" the carrier's liability, the Supreme Court plainly was referring to the dollar amount of such liability. The subject under discussion was the measure of damages, not the nature of the carrier's underlying obligations to cargo. It must be assumed that when Congress enacted the Carriage of Goods by Sea Act, just one year later, it was using those words in the same sense in prohibiting a clause "lessening such liability."

The Court of Appeals for the Second Circuit, in *Pan-Am Trade & Credit Corp. v. The Campfire,* 156 F. 2d 603 (1946), cert. den. 329 U.S. 774, 91 L. ed. 666, 67 S. Ct. 194, construed Cogsa as invalidating a clause which reduced the dollar amount of carrier liability otherwise than as authorized by the Act. The case involved a "pro-rata" clause, providing that carrier's liability should be determined on the basis of $500 per package "or pro-rata in case of partial loss." A partial loss having occurred in the amount of $676.94, the issue was whether the carrier was liable for the full $500 or for only a proportion thereof in accordance with the pro-rata clause. Cargo claimants argued that the clause was void as one

which "lessened" liability in a manner not authorized by the Act. The District Court agreed, held the clause void (64 F. Supp. 179), and that holding was affirmed on appeal:

> "The appellants argue that section 4(5) of the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304(5), printed in the margin, states only a maximum recovery for the loss of goods whose value the shipper has not declared, thus leaving the parties free to contract with respect to a lesser recovery; . . . The argument that the statute prescribes only a maximum recovery is met by section 3(8), 46 U.S.C.A. Sec. 1303(8), printed in the margin, which invalidates any clause 'lessening' the carrier's liability 'otherwise than as provided in this chapter.' Under section 4(5) the general rule for measuring the carrier's liability for 'any' loss is the 'amount of damage actually sustained,' but not to exceed $500 per package unless the shipper has declared the value of the goods before shipment. We agree with the district judge that to give effect to the pro-rata clause would 'lessen' the carrier's liability in a manner not authorized by any provision of 'this chapter.'" (156 F. 2d at pp. 604-605).

The meaning of the phrase "lessening such liability" was passed on again early this year in *Gulf Italia Co. v. S.S. Exiria,* 1958 A.M.C. 439 (S.D.N.Y. 1958), which involved the measure of a carrier's liability for damage to an unboxed tractor. Although the tractor was not in fact a "package", the carrier argued that the parties to the bill of lading had described it as such, and that therefore it should be deemed a package so as to limit the carrier's liability to $500 under section 4(5) of Cogsa.

On this point the Court referred to *Pan-Am Trade & Credit Corp. v. The Campfire, supra,* p. 12, and said (1958 A.M.C. at p. 442):

> ". . . the holding in that case is clear that any attempt to lessen the carrier's liability, other than by the terms of the Act, is invalid. To allow the parties themselves to define what a 'package' is would allow a lessening of liability other than by the terms of the Act. . . ."

A year before the Carriage of Goods by Sea Act was passed, the Supreme Court described a valuation clause as one which might lessen carrier's liability, using that phrase to refer to the measure of damages (*Ansaldo San Giorgio I v. Rheinstrom Bros. Co., supra,* p. 11). After Cogsa went into effect, it was established that the lessening of liability prohibited by section 3(8) also refers to the measure of damages (*Pan-Am Trade & Credit Corp. v. The Campfire, supra,* p. 12; *Gulf Italia Co. v. S.S. Exiria, supra,* p. 13). It is, therefore, logically inescapable that appellee's invoice value clause, or any other clause not expressly provided for in Cogsa, is invalid thereunder when the effect of its application would be to reduce the amount of the cargo owner's recovery.

III.

THE AUTHORITIES ESTABLISH THE INVALIDITY OF THE INVOICE VALUE CLAUSE.

Before examining the authorities on the present validity of invoice value clauses, it will be helpful to look at the

comment appearing in *Smith v. The Ferncliff,* 306 U.S. 444, 59 S. Ct. 615, 83 L. ed. 862 (1939). The case is important because, although it involved the validity of an invoice value clause in a Harter Act bill of lading, it did not reach the Courts until after the passage of Cogsa. The following language, appearing in the opinions of both the District Court (22 F. Supp. at pp. 742-743), and the Supreme Court (306 U.S. at p. 450, 59 S. Ct. at p. 617, 83 L. ed. at p. 866) shows recognition of the fact that the new Act had changed the law on valuation clauses:

> "The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act. . . ."

The extent of Cogsa regulation, and its effect on an invoice value clause almost identical to the one involved here, were laid down in *The Harry Culbreath,* 1952 A.M.C. 1170 (S.D.N.Y. 1951). The bill of lading provided that, "for the purpose of avoiding uncertainties and difficulties in fixing value," shipments worth less than $500.00 per package were to be valued at "invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less." Invoice value was substantially less than the sound market value at destination, and, after interlocutory decree for libelant (95 F. Supp. 312; affd. 187 F. 2d 310), the case was referred to a commissioner to determine the amount of damages legally recoverable. The Commissioner's report, confirmed by the District Court, held the clause invalid and awarded libelant the amount of damage actually sustained, based upon market value. The opinion cited sections 4(5) and 3(8) of the Act, quoted above, and concluded that:

> "the effect of the language of the two sections construed together is to establish the liability of a carrier for the actual damages (within the stated limits) suffered by the shipper and to invalidate the stipulation of the bills of lading if in fact its application results in a loss as it does under the facts of this case." (1952 A.M.C. 1175).

Three years after the *Harry Culbreath* decision, the same rule was announced by the Exchequer Court of Canada in a case arising under the English Carriage of Goods by Sea Act 1924. *(Nabob Foods Ltd. v. "Cape Corso" (owners),* 1954 Lloyd's Law List Reports, Vol. II, p. 40). The case is persuasive authority since the pertinent parts of the English and American statutes are identical, both having been derived from the Brussels Convention of 1924. (See the discussion of the movement for international uniformity in this field in *Knauth: The American Law of Ocean Bills of Lading,* 4th ed. 1953, pp. 118-131). In addition, the Canadian Court reached its decision largely on the basis of American cases construing Cogsa, there being no English or Canadian cases in point.

The valuation clause under discussion provided, like appellee's clause herein, that the value of cargo

> "shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less. . . ."

In issue was the validity of the foregoing clause under the English Act which provides, like our own, that

"8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules shall be null and void and of no effect." (1954 Lloyd's Law List Reports, Vol. II, p. 41).

After quoting from the Harter Act the Court distinguished the cases decided thereunder in the following logical discussion (pp. 42-43):

"The Harter Act, it may be noted, did forbid the 'lessening' of the carrier's 'obligations', but these obligations were confined to obligations to carefully handle and stow cargo, and did not extend to the general obligation to pay for damage to cargo. . . ."

"The Statute of 1924 goes considerably further than the Harter Act. Unlike the Harter Act, it not only nullifies any clause that 'relieves' the carrier 'from liability', but also any clause 'lessening such liability.' This covers liability to pay, as well as obligations to handle goods properly. . . . That is, a clause such as we have in Clause 9 is void whenever it would operate to lessen what would otherwise be the carrier's liability, regardless of the fact that under other circumstances the effect would be to increase the liability. That, I think, is the effect of the American decisions on the new Act, which is essentially the same as the English Act. . . . Even *Smith v. The Ferncliff,* supra, which is the most favorable case to the defendant, is small comfort, because the Supreme Court indicated quite plainly that the clause upheld under the Harter Act would have been bad under the new Act.

"The defendant argued that it would be unreasonable to prevent a pre-estimate of damage when the parties (say, two minutes after a claim for damages had arisen) had it in their power to make an agreement as to the valuation, which should form the basis of an adjustment of the loss.

"But the McCaull-Dinsmore case shows that the mere reasonableness of a clause is not enough to support it if it goes against the language of the statute. Furthermore, after a loss the parties are on a parity; but at the time of shipment the carrier is often in a position to dictate to the shipper what terms the Bill of Lading shall contain. The Act presumably strikes at such potential dictation.

"But all that aside and apart from authority, looking at Clause 9 of our Bill of Lading, I find it impossible to say that this clause is not directed to liability; and, moreover, is not a clause that in this particular case lessens liability. As I have pointed out, except under special agreement, liability is for the arrived sound market value. It may be, though I need not decide the point, that if this Bill of Lading declared that the arrived sound market value was to be taken at £900, that would govern, even though I might conclude that the real market value was £1000. However, this Clause 9 does not say anything like that. It purports to substitute for the arrived market value something entirely different; in other words, an entirely new measure of damages for the common law measure. In this case that measure lessens the carrier's liability, and so in my view the clause cannot be given effect to."

The Harry Culbreath and *The Cape Corso* are the only two cases containing any substantial discussion of the

post-Harter Act validity of invoice value clauses. Both condemn such clauses under identical provisions found in the later American and English statutes. Those statutes, both having their source in the Brussels Convention, are part of the move for international uniformity in bill of lading legislation. Uniformity of decision, therefore, is not only desirable; it is imperative, if the uniform legislation is to achieve its intended result. No reported decision of any Court has upheld an invoice value clause since the Harter Act was superseded. It is therefore difficult to understand the District Court's Order for Decree below which, *without citing a single case on the point,* concludes that "better authority" supports the validity of appellee's clause (Tr. 40). Appellant submits that not only the better authority but *all* judicial authority since the Act was passed, and simple logic apart from the cases, compel the conclusion that appellee's clause is void.

IV.

NEITHER THE "REASONABLENESS" OF A CLAUSE NOR ITS LONG-CONTINUED USE CAN SUSTAIN IT AGAINST THE PLAIN LANGUAGE OF THE STATUTE.

We expect appellee to argue here, as in the Court below, that its clause should be upheld because it is "reasonable" and because it has been in use for a long time. These arguments might have been appropriate in the Congressional hearings, but they have no place in construing the statute as written. Section 3(8) sets up one test—the *effect* of a clause. If it operates to lessen liability it is void. The statute does not say "any clause

except a reasonable clause,'' or ''any clause except one which has been in use for a long time,'' or ''any clause except one which was valid under the Harter Act.'' What it does say is that ''*any* clause, covenant, or agreement'' lessening the carrier's liability shall be null and void.

If the effect of a clause in a particular case is to reduce the carrier's liability (as it is herein), it makes no difference to the importer whether that clause is drawn in terms of a formula or an amount, or whether it is expressed as a ''true valuation clause'' as contrasted with a ''limitation clause.'' Assume, for example, that four shipments of coffee, each invoiced at $80 a bag, including freight and insurance, but worth $100 a bag in San Francisco, arrive in a valueless condition due to carrier negligence. Assume further that each shipment is subject to a different bill of lading clause on damages, as follows:

1. ''The agreed value of the goods per package shall be the invoice value.''
2. ''The agreed value of the goods per package shall be $80.''
3. ''The carrier shall not be liable for more than the invoice value of the goods per package.''
4. ''The carrier shall not be liable for more than $80 per package.''

The first two clauses are valuation clauses, while the last two are limitation agreements. Presumably the valuation clauses would have been upheld under the Harter Act, while the limitation clauses would not. Yet the effect on the importer is exactly the same in each case: to lessen the carrier's liability by twenty percent. That effect runs

counter to Cogsa 3(8) and renders all four of the examples void.

The long-continued use of invoice value clauses proves nothing as to their legal validity. It merely emphasizes the fact that bill of lading forms are prepared by the carriers and do not represent negotiated contracts. In *United States v. Farr Sugar Corp.,* 191 F. 2d 370, affirmed 343 U.S. 236; 72 S. Ct. 666; 96 L. ed. 907, the Second Circuit, in holding invalid the widely used "both-to-blame" clause, remarked as follows, (191 F. 2d at p. 374):

> "One other fact requires special note. The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; . . ."

To the same general effect is language appearing in the District Court's opinion in *Pan-Am Trade & Credit Corporation v. The Campfire,* 64 F. Supp. 179 at p. 183:

> "It is urged by the respondents that a prorating clause in a bill of lading has been used by American carriers since September 1, 1937; that during the Second World War, recently concluded, the United States War Shipping Administration approved and used a uniform bill of lading which contained a prorating clause; that this would indicate a practical construc-

> tion of the Act which this Court should follow. Although a prorating clause was incorporated in a uniform bill of lading in 1937 after the passage of the Act, the clause was not inserted at the request of the shippers. It was inserted by the carriers who prepared the bill of lading and it was in their interest to use it. The War Shipping Commission was a carrier, almost the sole American carrier during the war, and it too acted in its own interest in adopting the prorating principle in the event of a partial loss."

Both the "pro rata" and the "both-to-blame" clauses were in almost universal use for many years before they were first tested in the courts and found invalid. Both clauses appear in appellee's bill of lading, which is the subject of this appeal (see Tr. 36, clauses 17 and 9). The only permissible inference from the long and wide use of such invalid clauses, including the invoice value clause, is that the carriers who drafted them for their own advantage intend to continue to use them as long as they can get away with it. It was that type of attitude and practice on the part of ocean carriers which made section 3(8) necessary.

The most recent American admiralty treatise, *Gilmore and Black: The Law of Admiralty* (1957) points up the philosophy of section 3(8) in discussing the very issue involved in this case (p. 167):

> "The basis for fixing damages for loss of cargo under the general law is the market price at the port of destination on the day of arrival or when the vessel should have arrived. Before Cogsa was enacted, it seems to have been a common practice for the bill of lading to stipulate for 'invoice plus disbursements (freight and insurance)' as the measure of loss, and

> these stipulations were upheld. Under Cogsa, it has been held that such a clause, when it 'lessens' the carrier's liability, offends Section 3(8)."

The editors' comment is found in footnote 156:

> "These decisions seem clearly correct; Sec. 3(8) is in a sense the key to the Act, for it assures that the cargo interest will receive the broad benefits granted to it without gradual erosion by carefully contrived clauses in the bills of lading drawn up by carriers in concert. The only way it can fulfill this function is by being construed to mean what it says, without too great attention to arguments based on a 'convenience' which usually turns out to be carrier's convenience."

V.

THIS COURT SHOULD ORDER A DECREE BASED UPON MARKET VALUE.

This is not a case which, upon a reversal, must be sent back to the trial Court for retrial or for computation of damages. All of the factors required to compute damages in accordance with the proper rule appear in the agreed statement and the findings. They establish a liability on the part of appellee of $8,663.49 plus interest and costs. Once the invoice value clause is declared void nothing remains to be done except the entry of a decree in the proper amount.

The foregoing is true in spite of the continued presence in the case of the custom defense, and the trial Court's omission to make any findings or conclusions thereon. The alleged custom would substitute an invoice value formula

for the market value measure of damages, and would thus lessen appellee's liability in the same manner as the bill of lading clause. If the clause is one which may not validly be inserted in an express contract between the parties, it is elementary law that an equivalent custom or usage cannot be given effect.

Barnard v. Kellogg, 10 Wall. (U.S.) 383; 19 L. ed. 987;
Thompson v. Riggs, 5 Wall. (U.S.) 663; 18 L. ed. 704;
Ullrich v. State, 186 Md. 353; 46 Atl. 2d 637;
Interstate Trust Co. v. United States Nat. Bank, 67 Colo. 6; 185 Pac. 260;
3 *Williston on Contracts,* Revised Edition, 1936, p. 1890.

The Carriage of Goods by Sea Act was a compromise designed to balance the conflicting interests of carrier and shipper. The carriers received an automatic limitation of $500 per package, under section 4(5), without the necessity of a choice of rates which had been required under the Harter Act. Having granted that benefit to the carriers, Congress made it plain that no other restriction on the amount of cargo recoveries would be permitted. Section 4(5) says in so many words that a higher, but not a lower, maximum may be fixed, and section 3(8) invalidates clauses otherwise lessening the carrier's liability.

The effect of appellee's clause is to avoid the substance and intent of the Act. Thus, it proposes to pay invoice value *if less* than $500 per package, rather than market value, the legal measure of liability; but to pay only $500 per package if the invoice value is greater. The intent of

the clause, therefore, is to lower the maximum liability fixed by section 4(5), contrary to its express terms, and contrary to the terms of section 3(8).

We have learned from experience that a common carrier, having the power to dictate contractual terms, will use that power to its own selfish advantage unless restrained by the legislatures and the courts. Appellee's carefully contrived invoice value clause would, if allowed to stand, be a step in the gradual erosion of the benefits granted to cargo interests by the Carriage of Goods by Sea Act. To allow it to stand would be to ignore the plain language of the Act.

That the decree should be increased to the amount of $8,663.49, plus interest and costs, is

Respectfully submitted,

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Dated, San Francisco, California,
May 19, 1958.